

## A Citizens' Choice Framework for Net Neutrality

### Proposal to the United States Federal Communications Commission

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Mr. Chairman and Members of the Commission: Thank you for the opportunity to submit ideas regarding a path forward on the topic of Net Neutrality. In this memo, I propose that the FCC should pursue a compromise solution on Net Neutrality that both preserves the open Internet and permits opportunity for reasonable product differentiation and network management on IP networks.

The central tenet of this plan would be to locate the choice to differentiate services with the consumer, not with the Internet Service Provider. The overriding policy goal is to create incentives for increasing bandwidth infrastructure rather than monetizing or encouraging scarcity. And the plan should prioritize Managed Services that support national purposes as set forth in the National Broadband Plan.

The Citizens' Choice Framework would include the following elements:

1. Enact Default Rules for Internet Access Service.

The FCC should establish rules for Internet access service that set the default network management regime as nondiscrimination. Deviations from this core standard should be permitted for approved engineering purposes only, and may not be commercialized or sold. Qualification as a "reasonable network management practice" must hinge on an engineering requirement that does not result in an incentive to maintain bandwidth scarcity. This first step would ensure that the *status quo* of an innovation-friendly, open Internet platform endures.

2. Establishment of a Technical Advisory Committee.

The FCC should formally establish its Technical Advisory Committee of engineers (exclusively) from all sides of this debate. The FCC should establish rules for composition of the Committee to ensure that individuals from telecommunications companies, technology companies, and consumer advocacy organizations are all represented; participation by engineering academics should also be encouraged. This Committee should serve to evaluate engineering issues that arise for consideration as reasonable network management. This panel can establish best practices, in coordination with Internet engineering bodies, such as the IETF, over time. This Committee will need the ability to audit the carriers' systems in order to be effective.

This approach will avoid putting the FCC staff in the position of having to adjudicate every technical dispute – a task for which it is ill-suited at scale – and which will ensure that sound technical exceptions are permitted. In cases where the

Committee cannot reach a consensus, the FCC should establish a mechanism where the FCC staff evaluate the evidence, including statements by Committee members supporting or favoring the exception, to determine whether to permit the exception.

The United States government has experience in establishing such technical advisory committees, which should provide an effective blueprint for this engineering group. The Food and Drug Administration, for instance, has established such an advisory group to make technical assessments in the public interest. (For the sake of clarity, this Technical Advisory Committee should be the body authorized by statute, with appropriate procedural protections to constrain its activities appropriately, not a newly-created, *ad hoc* body.)

### 3. Enact Rules for Managed Services.

The FCC should establish rules to govern Managed Services. These services would be a class of IP-based services that are not Internet access service (i.e., services that are not available to all end-points on the public Internet). Prioritized carriage of Managed Services traffic (over basic Internet Access Service) is permissible under certain conditions.

The FCC should establish rules, based upon a series of principles set forth at the outset, that constrain the expansion of the Managed Services class to prevent it from swallowing the public Internet or functioning as a zone of pay-for-play, anticompetitive activity. As a baseline outcome, Managed Services must not be permitted to violate the overall policy principle of infrastructure growth and should be limited, as a percentage matter, to a certain limited percentage of network traffic (taken as a weekly average or through a similar, periodic means of measurement). Managed services should be marketed as separate from other types of consumer-facing services and not included in any bandwidth cap or as part of the overall upload/download capacity. Managed service treatment should only be available if the service does not fall under some other classification. Managed services as a class should operate on an open access basis. If a carrier sells a managed service of a particular type, it must offer the sale of bandwidth to a competitor at reasonable rates and subject to reasonable terms and conditions. These rules will be adjudicated on an *ex ante*, case-by-case basis.

All Managed Services should use a passive registration system at FCC to indicate their activation. In the event of a challenge by a consumer or business, the Commission shall review the service as registered. The FCC will presume eligibility for Managed Services treatment so long as the proposed service is credibly designed to serve one of the “national purposes” in the National Broadband Plan. The FCC will presume against eligibility for Managed Services treatment that: a) could be offered over the public Internet; b) show clear characteristics of anticompetitive motivation; c) draw down bandwidth otherwise allocated for Internet access service; and d) if not handled as a Managed Service, might otherwise result in discriminatory consumer harm. These presumptions (in either direction) may be overcome with evidence that the service offers benefits in the public interest,

promotes competition, and/or is consistent with the overall national policy framework. Managed Services to support the public safety infrastructure, for instance, would be an example of the type of prioritized carriage that might be permitted in such a regime.

For consumer-facing Managed Services, the key point is that the consumer alone is permitted to select the service(s) that will be prioritized. The consumer, not the ISP, can trigger any commercial arrangement for a Managed Service separately from the purchase of the underlying Internet access service subscription. The ISP and the content/service provider may not prioritize traffic for a Managed Service without affirmative consumer selection.

#### 4. Ground All Rules in a Principle of Technological Neutrality.

The FCC's rules across this entire framework must apply to all delivery systems of Internet access service and managed services. Certainly, the scope of "engineering purposes" and the reasonability of network management practices will vary from network to network. Such variability, however, should not in any way preclude universal application of a single framework of rules.

#### 5. Provide Adequate Transparency to Consumers and to the Commission.

The FCC's rules should require ISPs to supply clear information to current subscribers and at point-of-sale on all prices and fees associated with Internet access service and managed services. ISPs should also provide reasonably specific information about any network management practices in use to their subscribers and to the Commission, including network management associated with both Internet access service and managed services. The FCC should also require ISPs to provide updated disclosures regularly, for example through a publicly available and readily accessible web site, when network management practices are updated. The FCC and the Committee proposed in this memo should have access to adequate network data from carriers to make sound policy judgments consistent with these rules.

#### Important Notes:

- Title 6 services are not implicated by this regime.
- This approach would track, in part, the policy principle of abundance over scarcity, as codified by Canada in a 2009 CRTC decision.
- The architecture of consumer driven prioritization for Managed Services may not be immediately feasible for cable modem systems and 3G wireless networks as presently architected, but the plan should be enacted with the goal and presumption of accomplishing technological neutrality over time.